Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

EDWARD ISEN,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did not the Sixth Circuit create a split among the circuits in holding that the defendant employer in a suit for unlawful age discrimination was entitled to summary judgment where the record disclosed that summary determination could only be made predicated on the motive, intent, perception, and/or credibility of party witnesses?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties involved are named in the caption. There are no parent companies nor any nonwholly owned subsidiaries within the meaning of Supreme Court Rule 29.6.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for full-text publication.

JURISDICTIONAL STATEMENT

1. The United States Court of Appeals for the Sixth Circuit issued its written opinion on March 17, 2005.

2. There is no Order respecting rehearing, nor is there any Order granting an extension of time to file the petition for a writ of certiorari.

3. Supreme Court Rule 12.5 is not applicable to this petition for the writ of certiorari in that this is a petition for the writ of certiorari predicated on errors made by the United States Court of Appeals for the Sixth Circuit. The statute conferring United States Supreme Court jurisdiction over the instant controversy is believed by the petitioner to be 28 USC ¶ 1252.

STATUTES AND FEDERAL RULES INVOLVED IN THE CASE

29 USC ¶ 623[a]. Prohibition of age discrimination. It shall be unlawful for an employer-

> **[1]** to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

> [2] to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> [3] to reduce the wage rate of any employee in order to comply with this chapter.

Rule 56 [c], Federal Rules of Civil Procedure [elided]. Motion and Proceedings Thereon. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 10/10[a], Rules of the Supreme Court of the United States. Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> [a] a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

STATEMENT OF THE CASE

It is of note that the operative facts before both the District Court and the Sixth Circuit were wholly undisputed.

Federal jurisdiction in the United States District Court for the Western District of Tennessee was predicated on 28 USC ¶ 1331, in that this is a suit for money damages and other relief occasioned by the defendant's violation of the federal Age Discrimination in Employment Act (ADEA), 29 USC ¶ 623. The *gravamen* of Mr. Isen's suit against his former employer, Federal Express Corporation ("FedEx"), was that FedEx fired him for doing precisely the same thing that a younger employee did. The younger employee was reinstated as a part of FedEx's internal review system; Mr. Isen was not.

FedEx had what came to be called a "jumpseat policy," whereby FedEx management-level employees, such as Mr. Isen, could fly without charge on FedEx delivery planes for both business and certain other purposes. Mr. Isen often took advantage of this policy, as did a co-worker named Lolitha Noel. Mr. Isen was born on October 27, 1942; Ms. Noel is in her thirties. Both Mr. Isen and Ms. Noel were supervised by a man named Rhodes.

Mr. Isen's employment with FedEx was terminated on August 21, 2000; FedEx's stated reason for firing Mr. Isen was repeated violation of the "jumpseat policy." His termination was reviewed and ultimately affirmed by the FedEx internal review system. Ms. Noel was also discharged, but later reinstated. The internal review process disclosed that Mr. Isen had 137 instances of deemed "jumpseat" violations; Ms. Noel, 72 violations. Mr. Isen's purported transgressions occurred over a period of three years, but Ms. Noel's

occurred in only one year. So, the record before the courts below showed unequivocally that Ms. Noel averaged 72 violations per year, and Mr. Isen about 46.

Mr. Isen's theory of recovery was self-evident: he was fired for exactly the same offenses as those committed by a younger employee who was not ultimately thus disciplined. Consequently, reasoned Mr. Isen, FedEx's termination of his job was founded on an impermissible, pretextual basis, the true reason being his age.

Starkly illustrative of the principal error made both by the District Judge and by the Sixth Circuit was the observation made by Ted Merida, FedEx's Vice President for U.S. Operations Planning and Support, who as a practical matter was FedEx's internal court of last resort. Mr. Merida's words were these:

> "Your claim that you did not know you could not use business [jumpseat] reservations to go back and forth to Memphis, where your family lives, *is not believable.*" [emphasis supplied].

United States District Judge Samuel H. Mays, Jr. granted FedEx's Motion for Summary Judgment, holding that Mr. Isen had failed to present a *prima facie* case of age discrimination. The Sixth Circuit affirmed. In reaching these results, neither court gave so much as the faintest attention to one of the best-settled of all Rule 56 principles: except in the most extraordinary circumstances – none of which are present here – summary judgment cannot properly be predicated on matters of motive, perception, intent, or credibility.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's ruling in this case places it squarely in conflict with not less than three other circuits. The Second Circuit, the Fifth Circuit, and the Ninth Circuit have held that where, as here, a linchpin issue requires the resolution of an issue dealing with motive, intent, perception, or credibility, Rule 56 has no application and to grant a motion for Summary Judgment is tantamount to invading the province of the jury.

The Second Circuit. In *Kerzer v. Kingly Manufacturing Co.*, 156 F.3d 396, 400 (2nd Cir. 1998), the Second Circuit put a fine point on the matter:

> "...the district court's task is limited to discerning whether there are any genuine issues of material fact, *not to deciding them.* [Citations omitted]...Furthermore, in an employment discrimination case when, as here, the employer's *intent* is at issue, the trial court must be especially cautious about granting summary judgment." [Emphasis supplied].

The Ninth Circuit. In *Lam v. University of Hawaii,* 40 F.3d 1551, 1560ff. (9th Cir. 1994), the Ninth Circuit reversed and remanded a District Court defense finding on the theory that "bias" of a person in a position of employment decision making authority effectively precluded Rule 56 relief.

The Fifth Circuit. In whole accord is *Irwin v. United States,* 558 F.2d 249, 252 (5th Cir. 1977). *Irwin* is an IRS case, in which the Fifth Circuit correctly reasoned that summary judgment for the government simply could not be granted in

view of the extreme importance of the taxpayer's motive in making a particular financial decision.

The Sixth Circuit, *redux*. In view of the language in Mr. Merida's writing quoted hereinabove – he flatly disbelieved Mr. Isen – the result obtained in the Sixth Circuit is particularly troubling in light of its own rule, best enunciated in *United States v. L.E. Cooke Co.*, 991 F.2d 336, 343 (6th Cir. 1993):

> " ...witness credibility is solely within the jury's province, and courts] may not...make credibility determinations."

Here, for whatever reason or reasons, the Sixth Circuit utterly ignored its own rule, holding in effect that Mr. Merida's PERCEPTION of both Mr. Isen's MOTIVE and his CREDIBILITY was somehow sacrosanct, and could stand as a determinative predicate for the showing of a "valid, non-discriminatory" reason for firing Mr. Isen within the meaning of *Hein v. All Am. Plywood Co., Inc.*, 232 F.3d 482 (6th Cir. 2000). As a practical matter, when the burden shifted the Sixth Circuit permitted the perception of a defendant-employed executive to act as a substitute for the verdict of a jury. No other circuit has permitted such a thing, and it should not be permitted here.

The result obtained at the Sixth Circuit level in the case *sub judice* is made even more puzzling by the entirely contrary result reached by that tribunal in *Hafford v. Seidner*, 183 F.3d 506, 513ff. (6th Cir. 1999). There, the Sixth Circuit reversed in part a grant of summary judgment to a defendant employer in a race discrimination case, at least in part on the theory that a determination as to whether or not certain conduct was "extreme" did not lend itself to Rule 56

determination. The well-reasoned results in *Hafford* and *L.E. Cooke* cannot be reconciled, intellectually or otherwise, with the result obtained in the case at bar.

CONCLUSION

Over forty years ago, when summary disposition of civil cases was in its infancy, the United States Supreme Court held that "...a summary disposition...should be on evidence which a jury would not be at liberty to disbelieve..." *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 624, 64 S.Ct. 724, 88 L.Ed. 967 (1944). Addressing a more focused point, the Second, Fifth, and Ninth circuits have applied the rule correctly, and even the Sixth Circuit itself did so by implication in *Hafford*. There can be no serious dispute but that, at a minimum, a result different from that obtained here would have been obtained in not less than three other circuits. The instant case presents a superb opportunity for the United States Supreme Court not only to resolve a conflict among the circuits but also to exercise its supervisory authority and teach us, once and for all, precisely how matters of motive, intent, perception, and credibility impact Rule 56 determinations. The operative facts in this case are exceedingly clear and not in dispute; it is the technical disposition of those facts that must be resolved. For these reasons, concepts of fundamental fairness require that Howard Isen's petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-5539

[Filed March 17, 2005]

EDWARD ISEN,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
FEDERAL EXPRESS CORPORATION,	)
	)
Defendant-Appellee.	)
	)

Before: DAUGHTREY and CLAY, Circuit Judges; SCHWARZER, District Judge.*

Edward Isen, proceeding through counsel, appeals a district court judgment dismissing his employment discrimination action filed pursuant to the Age Discrimination

* The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

in Employment Act (ADEA), 29 U.S.C. § 623. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On October 9, 2002, Isen filed a complaint against Federal Express Corporation ("FedEx"). Isen, who was born on October 27, 1942, alleged that he was hired by FedEx in 1986, and he worked in a number of capacities. From July 1993 to February 1998, he worked as a Senior Engineer. From February 1, 1998, to August 21, 2000, when his employment was terminated, Isen worked as a Project Engineer in Spokane, Washington; under the management of Freddie Rhodes. Rhodes interviewed and selected Isen for the Project Engineer position in January 1998. Isen's employment was terminated because he violated FedEx's Jumpseat Policy. The Jumpseat Policy provides as follows:

> All permanent full-time and part-time employees are eligible for business travel Jumpseat privileges beginning on their hire dates. Business travel is defined as travel that would otherwise be paid by FedEx Express. Business may bump personal travel reservations up to three business days (Monday-Friday) before the day of the flight. Non-management employees must have their business travel authorized by their manager. The JUMPBIZ screen in PRISM enables managers to preauthorize business travel for employees in their organization.

According to Isen, his employment was terminated because of his age. Isen filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on July 8, 2000. After receiving a right-to-sue letter from the

EEOC on July 11, 2002, Isen filed the instant action, seeking declaratory, injunctive and monetary relief.

FedEx filed a motion for summary judgment, to which Isen responded. The district court granted FedEx's motion and dismissed the case. Isen has filed a timely appeal.

We review the district court's grant of summary judgment de novo. *Lanier v. Bryant,* 332 F.3d 999, 1003 (6th Cir. 2003). Summary judgment is appropriate when the evidence presented shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Fed. R. Cir. P. 56(c)).

An ADEA plaintiff must establish a prima facie case of discrimination by showing that he or she was: (1) a member of the protected class - - between the ages of 40 and 70; (2) otherwise qualified for the position; (3) subjected to an adverse employment action; and (4) either replaced by a younger person, or treated differently than a similarly-situated employee outside the protected class. *See Hein v. All-America Plywood Co.,* 232 F.3d 482, 489 (6th Cir. 2000); *Scott v. Goodyear Tire & Rubber Co.,* 160 F.3d 1121, 1126 (6th Cir. 1998). Similarly-situated means employees who "have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v. Toledo Hosp.,* 964 F.2d 577, 583 (6th Cir. 1992). The comparable employees must be similarly-situated in all relevant aspects, although an exact correlation is not required. *Seay v. Tenn. Valley Auth.,* 339 F.3d 454, 480 (6th Cir. 2003).

The sole issue before this court is whether Isen was "similarly-situated" to co-worker Lolitha Noel for discrimination purposes. Lolitha Noel's employment was also terminated for violating FedEx's Jumpseat Policy but Noel, who was in her thirties when she was terminated, was reinstated as an employee by the Appeals Board at the third stage of FedEx's Guaranteed Fair Treatment Procedure appeals process. Although Isen and Noel worked under the same supervisor, Rhodes, and their conduct was similar, in that they both violated the Jumpseat Policy and both claimed that they believed they had Rhodes's permission to do so, there are relevant differences in their conduct and experience demonstrating that they are not similarly-situated. For instance, Isen's violations of the Jumpseat Policy were more numerous. Noel booked her personal travel as business travel on seventy-two occasions, and Isen did so on 137 occasions. Both employees had homes in Memphis, and both claimed that Rhodes had told them they could use business jumpseat reservations for flights to Memphis. Isen, however, used business jumpseat reservations for flights to other destinations as well, including Fort Lauderdale, where he planned to vacation, and Washington, D.C. At the time he was terminated, Isen had been employed by FedEx for fourteen years. During that time, he had passed numerous jumpseat certification tests, which included testing on the approved uses for business jumpseat travel. Noel, by contrast, was in her first year of employment with FedEx at the time she was terminated. In its determination reinstating her employment, the Appeals Board stated that it "felt [Rhodes] might have been too lax[ ] in monitoring Noel's activities, especially with her being a new employee." Noel, unlike Isen, presented to the Appeals Board evidence it found persuasive that she believed she was authorized to book travel as she did. Those undisputed facts demonstrate that Isen and Noel were not similarly situated under the *Mitchell* test. Thus, Isen failed to

establish a prima facie case of age discrimination, and summary judgment for FedEx was proper.

Accordingly, the district court's judgment is affirmed.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 02-2770 Ma/V

[Filed March 12, 2004]

EDWARD ISEN,	)
	)
Plaintiff,	)
	)
v.	)
	)
FEDERAL EXPRESS CORPORATION,	)
	)
Defendant.	)
	)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On October 10, 2003, Defendant Federal Express Corporation filed a motion for summary judgment on Plaintiff Edward Isen's claims, which arise under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq*. Plaintiff responded on February 9, 2004, and Defendant replied on February 26, 2004. The court finds

that Defendant is entitled to summary judgment, and Defendant's motion is GRANTED.

The court's reasoning is set forth in a separate order under seal. The separate order discusses facts contained in filings subject to a protective order entered by United States Magistrate Judge Diane K. Vescovo October 31, 2003.

So ordered this 12th day of March 2004.

/s/_____
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

This document entered on the docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 3/12/04.

FOR ADDRESSEE'S EYES ONLY
Randall Tolley
LAW OFFICE OF RANDALL B. TOLLEY
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Memphis, TN 38103

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 02-2770 Ma/V

[Filed March 12, 2004]
Filed Under Seal

EDWARD ISEN,	)
	)
Plaintiff,	)
	)
v.	)
	)
FEDERAL EXPRESS CORPORATION,	)
	)
Defendant.	)
	)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Edward Isen's claims arise under the Age Discrimination in Employment Act of 1967 ("ADEA") , 29 U.S.C. § 621 *et seq*. Before the court is Defendant's motion for summary judgment, filed on October 10, 2003. Plaintiff responded on February 9, 2004, and Defendant replied on

February 26, 2004. For the following reasons, Defendant's motion is GRANTED.

I. Facts

The following facts are undisputed, except where otherwise noted. Isen was born on October 27, 1942. (Compl. at 2.) He was hired by Defendant Federal Express Corporation ("FedEx") in 1986, and he worked in a number of capacities. (Rhodes Decl. at ¶ 2.)[1] From July 1993 to February 1998, he worked as a Senior Engineer. (*Id.*) From February 1, 1998, to August 21, 2000, when his employment was terminated, Isen worked as a Project Engineer in Spokane, Washington, under the management of Freddie Rhodes. (*Id.*) Rhodes interviewed and selected Isen for the Project Engineer position in January 1998. (*Id.* at ¶ 3.)

FedEx has a "Jumpseat Policy" allowing its employees, under certain circumstances, to travel as passengers in its aircraft. The policy allows employees to travel for business or personal reasons. Employees traveling for business reasons are given priority over those traveling for personal reasons. (Isen Dep. at 36.) The Jumpseat Policy provides as follows:

> All permanent full-time and part-time employees are eligible for business travel Jumpseat privileges

---

[1] In his response to the motion for summary judgment, Isen moves to strike the declaration of Freddie Rhodes on the grounds that it "is not an affidavit, is not sworn to, and contains much information that is not 'personal knowledge' and should be stricken from consideration." (Pl.'s Resp. to Mot. for Summ. J. at 23.) Rhodes' declaration, however, is sworn to "under penalty of perjury" and signed. Isen does not identify the portions of the declaration he believes are not based on personal knowledge. His motion to strike is denied.

> beginning on their hire dates. Business travel is defined as travel that would otherwise be paid by FedEx Express. Business may bump personal travel reservations up to three business days (Monday-Friday) before the day of the flight. Non-management employees must have their business travel authorized by their manager. The JUMPBIZ screen in PRISM enables managers to preauthorize business travel for employees in their organization.

(Rhodes Decl. at Ex. 1.) To avoid having to approve each Jumpseat business trip, Rhodes preauthorized business Jumpseat travel for Isen and others in Rhodes' workgroup. (Rhodes Decl. at ¶ 5.)

The Jumpseat Policy contains the following provision related to personal travel: "All permanent, part-time and full-time employees are eligible for jumpseat privileges starting with their hire dates. Reservations for personal travel are accepted on first-come, first-served basis." (Jumpseat Policy, Rhodes Decl. Ex. 1.) The jumpseat reservation system requires each employee requesting travel to state whether the travel is for business or personal purposes. (*Id.*) Rhodes stated that an employee who plans to travel for personal reasons and claims he or she is a business traveler violates FedEx policies, including the Acceptable Conduct policy, and that doing so can result in discipline, including termination. (*Id.* at ¶ 8.) Similarly, the Jumpseat Policy states that "[d]eliberate falsification of travel status may result in termination." (Rhodes Decl. Ex. 1 at 3.)

Rhodes asserts that, at the time he preauthorized Isen for business travel, he instructed Isen to abide by the Jumpseat Policy and that he did not give Isen or any other employee permission to use "business Jumpseat" for personal travel.

(Rhodes Decl. at ¶ 9.) Isen disputes that assertion. In his deposition, Isen stated that Rhodes had told him that he could use business jumpseat reservations for personal travel to see his family in Memphis, Tennessee. (Isen Dep. at 38.) FedEx asserts, and Isen does not dispute, that each FedEx employee is required to take a Jumpseat test every six months to determine the employee's knowledge of jumpseat privileges and safety features. (Rhodes Decl. at ¶ 9.)

In June 2000, Rhodes conducted an investigation into the use of the Jumpseat Policy by the employees he supervised. He discovered that one employee, Lolitha Noel, had violated the policy by booking her personal travel as business travel seventy-six times. Rhodes terminated Noel's employment as a Service Engineer on June 23, 2000. (*Id.* at ¶ 16.) While investigating Noel's use of the Jumpseat Policy, Rhodes also discovered that Isen had made 137 business jumpseat reservations from January 1999 to June 2000 and traveled on at least fifty-four of those reservations. (*Id.* at ¶ 13.) During the same period, Isen booked twenty-nine jumpseat trips designated as personal and traveled at least eight of those times. (*Id.*) Other than Isen and Rhodes, no other employee supervised by Rhodes had misused jumpseat privileges. (Smith Decl. at ¶ 7.) On June 28, 2000, Isen sent Rhodes an electronic mail message stating that Isen was considering retiring. (Rhodes Decl. at Ex. 6.) Rhodes requested that Isen meet with him on July 5, 2000. (*Id.*)

On July 3, 2000, Isen e-mailed Rhodes to state that he had not reached a decision about whether to retire. (*Id.*) Rhodes and Isen met as planned on July 5, 2000. At that meeting, Isen admitted that he had used his business jumpseat authorization for personal purposes and apologized. (Rhodes Decl. at ¶ 13.) Rhodes advised Isen that his abuse of the jumpseat privilege was a serious violation. (*Id.* at ¶ 14.) In

response to a question from Isen, Rhodes stated that Isen could retire rather than being terminated. (*Id.*) On July I0, 2000, Isen sent Rhodes a memorandum stating that, in view of the pending investigation into his jumpseat travel, he planned to consult with Dean Smith, Senior Manager, and Sharon Rogers, Managing Director, before making a final decision on retirement. (Rhodes Decl. at Ex. 9.) The memorandum stated, "This investigation does not have to result in firing but I will rather retire if that is the final resolution that can be arrived at." (*Id.*)

Thereafter, Isen retired. However, on August 4, 2000, Isen wrote to Rhodes, stating "I agreed to retire a few weeks ago. After careful consideration, I do not think it was a right choice. I would like a fair hearing of my situation given that I have been with the company for about fourteen years and have a good track record." (Rhodes Decl. Ex. 10.) Rhodes sent Isen a memorandum on August 21, 2000, stating that Isen's employment was-terminated because Isen had violated the Jumpseat Policy. (*Id.* Ex. 11.) The memorandum stated, "After reviewing your Jumpseat log from January 6, 1999 - June 28, 1999, I found that you intentionally booked one hundred and thirty-seven unapproved business jumpseat trips for personal travel. Out of the [137] bookings, fifty-four of these bookings were confirmed check-in at the origin locations." (*Id.*) Rhodes enclosed a form Isen could use to initiate review of the decision using FedEx's Guaranteed Fair Treatment Procedure/EEO Complaint Process ("GFT Procedure"). The GFT Procedure is designed to handle employee complaints and problems, including allegations of employment discrimination. (Rhodes Decl. at ¶ 17 and Ex. 12.)

The GFT Procedure provides a three-step process. At Step 1, the decision-making manager together with the Senior

Manager and the Managing Director for the employee's unit meet with the employee in person or by telephone to discuss the employee's concerns. A Personnel Representative assists by gathering information. If the employee is dissatisfied, a Step 1 decision is rendered by the Managing Director in Writing. The employee can then proceed to Step 2, where the action is reviewed by the Regional Vice President of the division, who renders a decision in writing. If an employee wishes to pursue the matter further, he or she can appeal to the Appeals Board, which consists of the Chief Executive Officer, Executive Vice President and Chief Operating Officer, the Chief Personnel Officer, and rotating members including one Senior Vice President and one Vice President. The Appeals Board reviews all prior decisions and renders its own decision. Pursuant to the GFT Procedure, all of the Appeals Board's decisions are final and binding on FedEx and the employee. (Rhodes Decl. at ¶18 and Ex. 12.)

Isen pursued the GFT Procedure. Managing Director Sharon Rogers informed Isen by letter on September 12, 2000, that his termination was upheld at Step 1. Her letter stated:

> After a thorough review of your complaint, I am upholding your manager's decision to terminate your employment. Edward, during your GFTP, you stated that you were not aware of the travel and entertainment and jumpseat policies and the difference between personal jumpseat and business jumpseat. You also stated that your manager gave you a six-month blanket jumpseat approval for business jumpseat.
>
> After reviewing your jumpseat records, you had several bookings of both business and personal

jumpseats, which would indicate that you, in fact, knew the difference. Furthermore, you had signed both policies when you were hired as an engineer in Spokane, Washington. Additionally, you maintained your jumpseat certification every six months, which also describes that business jumpseat is for travel that would otherwise be paid for by FedEx to conduct business. You have been an employee since 1986, have received and signed for your handbooks, and also received your Employee Benefits books, all of which describe jumpseat benefits for both personal and business purposes.

You also stated that your manager gave you blanket six-month access for you to travel and said that you could travel to and from your home in Memphis to see your family, which is what you used the business reservations for (to and from Memphis). Yet, upon review of your jumpseat records, you also booked business jumpseat for travel to various other places, including Fort Lauderdale. When I asked you if you traveled there to conduct FedEx business, your reply was no, that you met your wife there, and you had other business in that city, not pertaining to FedEx or your job duties.

Your booking of business jumpseat reservations for personal travel was excessive, and as a result, you prevented other employees from using this benefit by taking priority booking .... Your manager has the ability to approve you and any one of his employees for a blanket coverage according to our policies and procedures, and this is often done for employees in your position .... It is not blanket coverage for you and any other employee to use for your personal

> travel, and I am convinced you knew the difference for the reasons stated above.

(Rhodes Decl. at Ex. 13.) Isen appealed to Step 2, and his claim was again denied on September 29, 2000. (*Id.* Ex. 14.) Ted Merida, Vice President for U.S. Operations Planning and Support, wrote, "Your claim that you did not know you could not use business reservations to go back and forth to Memphis, where your family lives, is not believable." (*Id.*) Merida also stated:

> What is even worse are the trips you took that were, by your own admission, personal in nature to [Fort Lauderdale] and [Washington, D.C.]. There were many other personal trips booked that could not be substantiated as actually taken in our system. However, the fact that you booked all those trips as business, and probably cancelled them later, violates the spirit and intent of the policy as it denied all other employees the use of this very important corporate benefit for those flights on those days.

(*Id.*) Isen then appealed to the Appeals Board, which upheld Isen's termination on November 22, 2000. (*Id.* Ex. 15.)

Noel, the other employee in Rhodes' group who had been terminated for abusing jumpseat privileges, also pursued the GFT Procedure. Her termination was upheld at Step I. Noel filed an internal EEO complaint with FedEx on July 12, 2000, which was investigated but not substantiated. (Temple Decl. at ¶ 4.) The matter was referred back to the GFT Procedure, and Noel's termination was upheld at Step 2. (*Id.*) She appealed to the Appeals Board and submitted materials that had not been presented at Step 1 or Step 2, including the transcript and tape of a hearing on unemployment

compensation before the State of Washington Office of Administrative Hearings. (*Id.* at ¶ 7.) In that proceeding, the hearing examiner had concluded that Noel believed she had permission to use business jumpseat reservations for personal travel. (*Id.*) The Appeals Board then decided to overturn Noel's termination on June 14, 2001 and reinstate Noel's employment with a warning, six months' suspension of jumpseat privileges, and back pay minus sixty days. (*Id.*)

Isen had previously been terminated by FedEx in 1986, but he successfully pursued the GFT Procedure and his termination was overturned. (Isen Dep. at 24-28.) Isen states that, after he was reinstated, his former manager Steve Liberto told him "you have won the battle, but you'll never win the war." (*Id.* at 26-27.) Isen testified that there were no statements by Rhodes that would support a theory that his termination in 2000 had any connection with his termination in 1986. (Isen Dep. at 95-97.) Liberto had no contact with Rhodes or with Dean Smith regarding Isen or any other employee during the time that Isen worked in Rhodes' group. (Rhodes Decl. at ¶ 27; Smith Decl. at 8.)

Asserting that he became aware of Noel's reinstatement in May 2002, Isen filed a complaint with the Equal Employment Opportunity Commission ("EEOC" on July 8, 2002, regarding his August 21, 2000 termination. After receiving a Notice of Right to Sue, he filed the complaint in the instant case on October 9, 2002, alleging that FedEx had violated the ADEA. Isen also mentions the Civil Rights Act of 1991 and the Tennessee Human Rights Act in his complaint, but he does not specify any causes of action related to either of those Acts.

II. Jurisdiction and Venue

The court has jurisdiction under 28 U.S.C. §§ 1331 and 1343 (a) (3) and (4) . Under. 28 U.S.C. § 1391(b), venue is proper in this district because the action arises from events occurring in the Western District of Tennessee.

III. Summary Judgment Standard

The party moving for summary judgment "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986) . The moving party can meet this burden by pointing out to the court that the respondents, having had sufficient opportunity for discovery, have no evidence to support an essential element of their case. *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) .

When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. A genuine issue for trial exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) . The party opposing the motion must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmoving party may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Instead, the nonmoving party must present "concrete evidence

supporting its claims." *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989). The district court does not have the duty to search the record for such evidence. *See InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 110-11(6th Cir. 1989). Nonmovants have the duty to point out specific evidence in the record that would be sufficient to justify a jury decision in their favor. *See id.*

IV. Analysis

A. Discrimination Claims

Isen alleges employment discrimination on the basis of age in violation of the ADEA.[2] His theory of the case is that he unlawfully received less favorable treatment than Noel, who was also terminated for violating FedEx's Jumpseat Policy but who was later reinstated. The ADEA provides in relevant part: "It shall be unlawful for an employer - (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) . In an ADEA case, the plaintiff carries the ultimate burden of persuasion to establish by a preponderance of the evidence that age was a determining factor in the adverse action that the employer took against him. *Phelps v. Yale*

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[2] To the extent that Isen also raises a claim under the Tennessee Human Rights Act, the same analysis applies. *Newsom v. Textron Aerostructures*, 924 S.W.2d 87, 96 n.12 (Tenn. App. 1995) ("The purpose of the THRA is essentially identical to the ADEA; therefore, federal authority interpreting the ADEA is often utilized by courts of this state in applying the THRA.") .

Sec., Inc., 986 F.2d 1020, 1024 (6th Cir. 1993); *Wilkins v. Eaton Corp.*, 790 F.2d 515, 520 (6th Cir. 1986).

Isen does not contend that he has direct evidence of discrimination. In the absence of such direct evidence, ADEA claims of discrimination are analyzed under the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Hedrick v. Western Reserve Care Sys.*, 355 F.3d 444, 453 (6th Cir. 2004). Under that analysis, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination. To do so, a plaintiff must establish that he was: (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position from which he was rejected or terminated, and (4) either replaced by a person from outside the protected class or treated differently than a similarly situated employee from outside the protected class. *Hein v. All Am. Plywood Co., Inc.*, 232 F.3d 482, 489 (6th Cir. 2000). If the plaintiff establishes a prima facie case, the burden of persuasion shifts to the employer to present a legitimate non-discriminatory reason for the challenged employment decision. *Id* If the employer carries this burden of persuasion, then the burden returns to the plaintiff to prove by a preponderance of the evidence that the employer's proffered reason was in fact a pretext designed to mask illegal discrimination. *Id*

Isen has established that he was a member of the protected class. The ADEA protects individuals who are at least forty years old at the time of the alleged discrimination. *Hedrick*, 355 F.3d at 459. Isen, born in 1942, was over forty at all times relevant to this litigation. It is undisputed that Isen was subject to an adverse employment action when his employment was terminated, and FedEx does not argue that Isen was unqualified for his position as Project Engineer.

Therefore, Isen satisfies the first three elements of a prima facie case.

To satisfy the fourth element, Isen must have been treated differently than a similarly situated employee from outside the protected class.[3] FedEx does not dispute that Noel, a younger employee, is outside the protected class. FedEx does dispute that Isen and Noel were treated differently at the relevant time, which FedEx argues was the time each employee was terminated by Rhodes rather than the later time the corporation's internal grievance process was completed. It contends that a decision by the Appeals Board is not an adverse employment action because Isen had already been terminated. FedEx argues that "[t]he mere fact that the Appeals Board decided to overturn Noel's discipline on [the] record does not mean that Freddie Rhodes, the terminating manager, engaged in disparate treatment of Edward Isen because of his age." (Def's Mem. in Supp. of Mot. for Summ. J. at 13.) In support of that argument, FedEx cites *International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).[4] That case involved a statute of limitations

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[3] Isen could also satisfy the fourth element by establishing that he was replaced by someone outside the protected class. Neither party addresses whether Isen's replacement was a member of the protected class, however.

[4] Isen requests that the court strike the citation to this case because FedEx's motion included a typographical error. It cited the case as "420 U.S. 229." Isen refers to the case actually located at 420 U.S. 229 and asserts that FedEx's citation violates Local Rule 7.2 (d)(2) because "summary judgment motions [sic] shall have citations to appropriate legal authorities." (Pl.'s Resp. to Mot. for Summ. J. at 27.) Isen's request to strike is denied.

question. Specifically, the Supreme Court was asked to determine whether the utilization of collective-bargaining grievance procedures after a termination tolled the running of the statutory limitations period for filing a claim with the EEOC. The Court looked to the intentions of the parties, noting that both the employer and the employee treated the termination as final despite the availability of the grievance process. It held that the termination was the triggering event for the limitations period, but noted that the parties could have agreed to a contract under which the result of the grievance procedure constituted the relevant statutory occurrence. *Id.* at 234-36. Because the Supreme Court was not addressing the question presented here and likely did not intend to foreclose all claims involving discrimination in grievance processes, *Electrical Workers* is not determinative. Isen argues that "[t]he disparate review of Freddie Rhodes' decision as compares to Noel is exactly what was complained of and is discriminatory in this case." (Pl.'s Resp. to Mot. for Summ. J. at 27.) For purposes of deciding the motion for summary judgment, the court will assume without deciding that the Appeals Board's decisions to uphold Isen's termination and to reinstate Noel's employment constitute "different treatment" within the meaning of the fourth element of a prima facie case under the ADEA.

FedEx also argues that Isen has not made out a prima facie case because he has not shown that Noel was similarly situated. It contends that the two former employees are not similarly situated because Noel presented transcript evidence of an unemployment compensation hearing "that persuaded the [Appeals Board] that Noel reasonably believed that she had permission to utilize business Jumpseat for personal travel whereas Isen did not present such evidence." (Def.'s Mem. in Supp. of Mot. for Summ. J. at 14, citing Temple Decl. at ¶ 14) . Alternatively, FedEx argues that it is entitled to rely on

the Appeals Board's decision because FedEx has a policy that Appeals Board decisions are final and binding on the company and its employees. In *Mitchell v. Toledo Hospital*, the Sixth Circuit stated that "[i]t is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of [other] employees, the plaintiff must show that the 'comparables' are similarly-situated *in all respects*. 964 F.2d 577, 583 (6th Cir. 1992) (citing *Stotts v. Memphis Fire Dep't*, 858 F.2d 289 (6th Cir. 1988)). To be deemed "similarly-situated", the individual with whom the plaintiff seeks to compare his treatment "must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Id.*

Isen and Noel worked under the same supervisor, Rhodes, and their conduct was similar, in that they both violated the Jumpseat Policy and both claimed that they believed they had Rhodes' permission to do so. However, there are relevant differences in their conduct and experience demonstrating that they are not similarly situated. Isen's violations of the Jumpseat Policy were more numerous. Noel booked her personal travel as business travel on seventy-two occasions, and Isen did so on 137 occasions. Both employees had homes in Memphis, and both claimed that Rhodes had told them they could use business jumpseat reservations for flights to Memphis. Isen, however, used business jumpseat reservations for flights to other destinations as well, including Fort Lauderdale, where he planned to vacation, and Washington, D.C. At the time he was terminated, isen had been employed by FedEx for fourteen years. During that time, he had passed numerous jumpseat certification tests, which included testing on the approved uses for business jumpseat travel. Noel, by contrast, was in her first year of employment with FedEx at

the time she was terminated. In its determination reinstating her employment, the Appeals Board stated that it "felt [Rhodes] might have been too lax[] in monitoring Noel's activities, especially with her being a new employee." (Def.'s Reply Ex. D.) Noel, unlike Isen, presented to the Appeals Board evidence it found persuasive that she believed she was authorized to book travel as she did. Those undisputed facts demonstrate that Isen and Noel were not similarly situated under the *Mitchell* test. There were circumstances that distinguished Isen's conduct from Noel's and justified FedEx's different treatment of the two employees after each violated the Jumpseat Policy. Thus, Isen has failed to establish a prima facie case of age discrimination, and summary judgment in favor of FedEx is appropriate.

Even assuming that Isen had established a prima facie case, summary judgment in favor of FedEx would still be appropriate under the *McDonnell Douglas* framework because FedEx has offered evidence of legitimate, non-discriminatory reasons for its decision to terminate Isen, and Isen has failed to rebut that evidence. "[A]n employer may make a subjective judgment to discharge an employee *for any reason that is not discriminatory*." *Wilkins*, 790 F.2d at 521 (quotation omitted). As discussed above, once an employer has articulated a legitimate reason for its action, the plaintiff has the burden of showing, by a preponderance of the evidence, that the stated reason "is a mere pretext or 'cover-up' for what was in truth a discriminatory purpose." *Id.* (quotation omitted). "The factfinder may not focus on the soundness of the employer's business judgment." *Id. See also Hedrick*, 355 F.3d at 462 (noting that federal courts do not sit as a "super-personnel department") .

Specifically, FedEx has offered evidence that Isen violated the Jumpseat Policy over one hundred times during the period

he was supervised by Rhodes. The Jumpseat Policy states that falsifying travel status may result in termination. The August 21, 2000 letter from Rhodes indicated that Isen's Jumpseat Policy violations were the reason for his termination. Isen has presented no evidence to indicate that Rhodes' stated reason was pretextual. Indeed, Rhodes had selected Isen to work in his group only two years before, when Isen was fifty-six years old. In *Buhrmaster v. Overnite Transportation Company*, the Sixth Circuit adopted the same-actor inference, "which allows one to infer a lack of discrimination from the fact that the same individual both hired and fired the employee." 61 F.3d 461, 463 (6th Cir. 1995) . Similarly, all the evidence from the grievance process indicates that Isen's termination was upheld at Steps 1 and 2 and by the Appeals Board because the reviewers agreed that Isen's abuse of the Jumpseat Policy warranted termination.

Isen can rebut FedEx's proffered reasons by showing that (1) the proffered reasons have no basis in fact, (2) the proffered reasons did not actually motivate the discharge, or (3) they were insufficient to motivate the discharge. *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). He has not done so. Isen has provided no evidence to show that Rhodes' stated reasons for terminating him, or the Appeals Boards' reasons for upholding that termination, were not based in fact or were not the real reason for their decisions. Isen does make unsupported assertions that Rhodes "did consider Isen's age a factor" and that "[m]anagement also singled him out in denying his GFT claims while approving those of a younger employee." (Pl.'s Resp. to Mot. for Summ. J. at 9) Bare allegations are insufficient to satisfy his burden, however. Accordingly,

FedEx is entitled to summary judgment on Isen's ADEA and THRA claims.[5]

B. Retaliation Claim

Although Isen did not identify it in his complaint, Title VII of the Civil Rights Act of 1964, as amended, prohibits retaliation against an employee "because he has opposed any practice made an unlawful employment practice... or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing," in connection with an unlawful employment practice. *See* 42 U.S.C. §2000e-3(a).[6]

Absent direct evidence of retaliation, claims for retaliation under Title VII are subject to the same burden-shifting framework as claims for age discrimination under the ADEA. *See Wrenn v. Gould*, 808 F.2d 493, 500-02 (6th Cir. 1987). That is, if a plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment action. *Id.* at 501. If the defendant does so, the plaintiff can prevail only by showing that the articulated reason is false or pretextual. A prima facie case of retaliation is established

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[5] Although Plaintiff mentions the Civil Rights Act of 1991 in the opening paragraph of his complaint, he has otherwise failed to prosecute that claim or describe the cause of action he seeks to raise. The relevance of the Civil Rights Act of 1991 to Isen's case is unclear. Because there is no evidence supporting such a claim, FedEx is also entitled to judgment on that claim.

[6] The ADEA, in 29 U.S.C. § 623(d), provides relief from retaliation in employment for filing a complaint of discrimination on the basis of age. Isen does not contend that FedEx retaliated against him for complaining about age discrimination.

when a plaintiff shows that (1) he engaged in an activity protected by Title VII, (2) his protected activity was known by the defendant, (3) the defendant thereafter took an employment action adverse to the plaintiff, and (4) there was a causal connection between the protected activity and the adverse employment action. *Id.* at 500.

Isen apparently contends that FedEx's decision to terminate his employment in 2000 was retaliation for his conflict with his supervisor, Liberto, in 1986. His complaint states that "Plaintiff avers that the bogus jump-seat write-up was used as an excuse to get rid of him because his manager in 1986, Stephen Liberto...categorically told Hr. Isen that he 'will not win the war,' referring to the past conflict the two had." (Comp. at ¶ 10.)

Because Plaintiff has failed to provide evidence that he had engaged in any activity protected by Title VII, FedEx is entitled to judgment on Isen's retaliation claim. Additionally, there is no evidence that FedEx's decision to terminate Isen was motivated by a desire to retaliate against Isen for a conflict that occurred fourteen years before. Isen has not satisfied the first, second, or fourth elements of a prima facie case. Even assuming that Plaintiff had established a prima facie case, his retaliation claim, like his discrimination claim, would fail because he has not offered evidence to rebut FedEx's stated reasons for terminating him. He was not terminated until fourteen years after the purported conflict, during which time FedEx discovered that Isen had violated its Jumpseat Policy more than one hundred times. Summary judgment in favor of FedEx is therefore appropriate on Isen's retaliation claim.

V. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment is GRANTED.

Because this order discusses in detail facts contained in filings subject to a protective order entered by United States Magistrate Judge Diane K. Vescovo October 31, 2003, this order shall be filed under seal.

So ordered this 12th day of March 2004.

/s/_____
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

(2)

No. 04-1701

IN THE

Supreme Court of the United States

EDWARD ISEN,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals' decision, which was based on objective and undisputed facts and was not predicated on the motive, intent, perception and/or credibility of party witnesses, evidences a split among the circuits with respect to the standard for granting summary judgment.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Federal Express Corporation, is wholly owned by FedEx Corporation.

Pursuant to United States Supreme Court Rule 15, Respondent Federal Express Corporation (hereinafter "Respondent") hereby submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioner's Statement of the Case incorrectly characterizes proceedings before the District Court and the Court of Appeals. Petitioner correctly states that all of the operative facts are wholly undisputed. Petition, p. 3.

Petitioner's employment with Respondent was terminated because of Petitioner's violation of the "jumpseat" policy under which employees could, under certain circumstances, travel as passengers on Respondent's business aircraft. Petitioner claimed that his termination was discriminatory because a younger employee (the "Comparator") also violated the "jumpseat" policy and her employment was not terminated. The District Court held that the Comparator was not "similarly situated" to Petitioner for purposes of a *prima facie* case of discrimination. Petition, pp. 21a-23a. In particular, the District Court concluded that the Petitioner had more numerous policy violations than Petitioner; that Comparator only booked jumpseat travel to her Memphis home while Petitioner booked travel to different locations; and that Petitioner had been employed with Respondent for fourteen years while Comparator had only been employed for one year. Petition, pp. 22a-23a During Petitioner's longer employment, he passed numerous jumpseat certification tests, including tests for approved uses for business jumpseat travel. Petition, p. 22a. The District Court further held that, even if Petitioner, established a *prima facie* case, he failed to show that Respondent's conduct was a pretext for intentional discrimination. Petition, p. 23a.

On appeal to the Sixth Circuit, Petitioner did not challenge the factual basis of the dissimilarities that were determinative to the District Court. The Sixth Circuit properly stated the standard for summary judgment: "when the evidence presented shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Petition, p. 3a (citing Fed. R. Civ. P. 56(c)). In applying this standard to affirm the District Court, the Sixth Circuit addressed only a single issue, whether the Petitioner had established that he was "similarly situated" to Comparator. The Court of Appeals did not address whether Petitioner had demonstrated that Respondent's nondiscriminatory reason for terminating Petitioner was a pretext for intentional discrimination. Like the District Court, the Court held that the Petitioner and the Comparator were not "similarly situated" for several reasons, including: (1) Petitioner violated the "jumpseat" rule on 137 occasions and Comparator violated the rule on 72 occasions; (2) Plaintiff used "jumpseat" reservations to fly to destinations other than his home in Memphis and Comparator only used "jumpseat" reservations to fly to her home in Memphis; and (3) Plaintiff had been employed by FedEx for fourteen years and had numerous certification tests for "jumpseat" use while Comparator had been employed by FedEx for only one year. Petition, p. 4a.

REASONS FOR DENYING THE PETITION

The Petition should be denied because the decision of the Court of Appeals is correct and consistent with decisions of other Courts of Appeals as well as the applicable standard for granting summary judgment. Any perceived conflict among the Courts of Appeals or other alleged error is based solely on the Petitioner's mischaracterization of the basis of the opinion of the Court of Appeals.

The issue presented herein by the Petitioner incorrectly suggests that the Sixth Circuit ignored genuine questions of material fact to reject Petitioner's claim that Respondent engaged in intentional discrimination. Petitioner's assertion is apparently based on a statement made by Respondent with respect to the credibility of Petitioner. *See* Petition, pp. 4, 6. The Sixth Circuit, however, did not rely on or even reference that statement in its opinion or in any way address Petitioner's credibility.

Instead, the Court of Appeals' decision addressed only a single prong of the well-established test for a *prima facie* case in an employment discrimination case. Based on objective and undisputed facts, the Court of Appeals concluded that Petitioner had not satisfied this essential element of his claim. In the absence of a *prima facie* case, the Court of Appeals did not address whether Respondent's legitimate and nondiscriminatory reason for terminating Petitioner was pretext for intentional discrimination. Most importantly, the Court of Appeals did not address any issues of subjective intent or motive, but rather only considered whether Petitioner's Comparator was similarly situated for purpose of a *prima facie* case.

The Sixth Circuit's holding does not evidence any split among the circuits or otherwise warrant review on certiorari. First, the issue as stated by the Petitioner was not decided or considered by the Sixth Circuit and therefore is not appropriate for review by certiorari. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976). In particular, the Sixth Circuit's holding plainly was not "predicated on matters of motive, perception, intent or credibility." Petition, pp. i, 4. The Sixth Circuit identified several differences between Petitioner and the alleged Comparator (all based on objective and undisputed facts) and properly affirmed summary judgment on that basis. The Sixth Circuit opinion makes clear that, contrary to Petitioner's assertions, the Sixth

Circuit did not construe Respondent's perception of Petitioner's motive and credibility as "sacrosanct" for purposes of analyzing the validity of any non-discriminatory reason for Plaintiff's termination. *See* Petition, p. 6.

Second, the issue that was considered and decided by the Sixth Circuit – affirmation of summary judgment for failure to establish a *prima facie* case — is wholly consistent with decisions of the other courts of appeals. *See, e.g., Hudson v. Chicago Transit Authority*, 375 F.3d 552, 560-61 (7th Cir. 2004) (granting summary judgment when plaintiff failed to present proof that similarly situated employee was treated differently); *Rose-Maston v. NME Hospital*, 133 F.3d 1104, 1109 n.4 (8th Cir. 1998) (same); *Shumway v. UPS*, 118 F.3d 60, 64 (2d Cir. 1997) (same); *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997) (same).

The circuit court opinions cited by Petitioner also do not demonstrate the existence of any conflict on any issue, but simply address the appropriate standard for granting summary judgment and apply that standard to specific facts. *See Kerzer v. Kingly Manufacturing Co.*, 156 F.3d 396, 400 (2d Cir. 1998) (general standard for granting summary judgment); *Lam v. University of Hawaii*, 40 F.3d 1551, 1560 (9th Cir. 1994) (reversing summary judgment on one claim under specific facts); *Irwin v. United States*, 558 F.2d 249, 252 (5th Cir. 1977) (reversing summary judgment where moving party did not meet burden). In the same way, the Sixth Circuit's opinion is not contrary to its circuit precedent. *See Hein v. All American Plywood Co.*, 232 F.3d 482 (6th Cir. 2000) (plaintiff's "subjective interpretation" insufficient as matter of law to establish discrimination claim); *Hafford v. Seidner*, 183 F.3d 506, 513 (6th Cir. 1999) (affirming summary judgment for claim based on religious comments that were not so "extreme [as] to amount to a change in the terms and conditions of employment"); *United States v. L.E. Cooke*

Co., 991 F.2d 336, 343 (6th Cir. 1993) (no abuse of discretion in denial of motion for new trial where evidence was sufficient to support verdict).

Third, the issue presented for review by Petitioner is also not appropriate for review by certiorari because, regardless of the resolution of that issue, the decision of the Sixth Circuit should be upheld on other grounds. The Sixth Circuit identified multiple dissimilarities between the Petitioner and Comparator and Petitioner at most challenges only one of those differences. Therefore, even if this Court determines that the Sixth Circuit erred with respect to the question presented, that court's decision would remain unchanged.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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